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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

MAR 17 2004

FILE: WAC 02 161 51613 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(33) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional. The petitioner is an aerospace technical services firm. It seeks to employ the beneficiary permanently in the United States as a contract administrator. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that director failed to adequately review the petitioner's tax return information.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(g)(2). Here, the petition's priority date is April 20, 2001. The beneficiary's salary as stated on the approved labor certification is $31.40 per hour or $65,312 annually.

As evidence of its ability to pay, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for the years 1998, 1999 and 2000. Each of these documents covers a fiscal year running from October 1st to September 30th. As noted by counsel on appeal, the director's decision failed to acknowledge that the petitioner's data covered its financial status as of the April 20, 2001 priority date. This information was presented in the 2000 federal corporation tax return that covered the petitioner's fiscal year from October 1, 2000 to September 30, 2001. This tax return shows that the petitioner had gross receipts/sales of $733,070, officers' compensation of 325,766, no salaries and wages, and a taxable income before net operating loss deduction (NOL) of $10,138. Schedule L of this tax return also reflected that the petitioner had $17,405 in net current assets.

As noted above, the director denied the petition determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. We withdraw

that portion of the director's decision relying upon the assumption that the petitioner failed to submit its tax information covering the period until September 30, 2001, but we concur with the director's conclusion that the petitioner has not demonstrated its ability to pay the proffered wage. We note that neither its taxable income of $10,138 before the NOL deduction and special deductions nor its net current asset figure of $17,405 was sufficient to meet the beneficiary's offered wage of $65,312.

On appeal, counsel resubmits the petitioner's 2000 corporate tax return. Counsel contends that the petitioner's gross income should be considered when evaluating the petitioner's ability to pay. Counsel also argues that the depreciation and officers' compensation figures should also be added back to the petitioner's net income. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman,* 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). Counsel's assertion that officers' compensation should be included in the calculation is also unpersuasive. This compensation represents funds already disbursed and is not readily available to pay the wage of the beneficiary as of the filing date of the petition.

Counsel also submits copies of the petitioner's bank statements and securities accounts in support of his assertion that the petitioner has sufficient cash flow and assets available to pay the beneficiary's offered wage. There has been no proof presented, however, to show that these amounts somehow represent additional funds beyond those figures presented in the petitioner's tax return relevant to the visa priority date. It is also noted that 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for the basic evidentiary requirements.

Finally, counsel also contends that the president of the petitioning business has a personal securities portfolio available to pay the proffered wage. In this case, the petitioner is organized as a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel,* 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

As set forth in its federal tax return filed for the fiscal year covering the period from October 1, 2000 until September 30, 2001, neither the petitioner's taxable income before the NOL deduction and special deductions nor its net current assets were sufficient to cover the beneficiary's proffered wage as of the visa priority date. We cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the visa petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.